Swan Coal Company *and* United Mineworkers of America. Cases 9-CA-17926, 9-CA-19032, and 9-RC-13948

2 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 10 August 1983 Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed cross-exceptions and a supporting brief, the Charging Party filed a brief in response to the Respondent's exceptions, and the Respondent filed a brief in opposition to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified herein, and to adopt the recommended Order.

1. The judge concluded that the Respondent violated Section 8(a)(1) when Supervisor Bruns testified in the presence of employees at a representation hearing held in November 1981 that a reduction in work hours was prompted by the employees' display of union badges. We find merit in the Respondent's exception to the finding that this testimony violated the Act. In light of the facts that the statement was made in a prior Board proceeding, under oath, and in response to a question put by counsel, that it was not specifically alleged as a violation in the complaint, and that the General Counsel stated on the record in this proceeding that it was being introduced only as a "statement against interest" to support the allegation that the hours reduction itself was unlawfully motivated, we reverse the judge's finding that Bruns' testimony violated the Act.

2. The judge found that, sometime in November 1981, Supervisor Bruns told employee Allberry that certain employees who opposed unionization did not "appreciate" Allberry's prounion position and that Bruns could not assure Allberry's safety on the job. The judge also found that Supervisor Nelson asked employee Buchanan why he had stopped to speak to a group of union advocates who had gathered for one of their frequent prounion rallies outside the mine's main entrance, and that Nelson then asked Buchanan to "stop by" in the future to tell Nelson "what was going on." In addition to finding that the statement to Allberry constituted an unlawful threat of physical harm and that the statement to Buchanan contained an unlawful interrogation and request that Buchanan report on future union activities, the judge found that both conversations conveyed the impression that the Respondent had been engaging in surveillance of union activities. We find merit in the Respondent's exceptions to the finding of impressions of surveillance in these two statements.

We find that Allberry's prounion stance was a matter of public knowledge, for he was an open union advocate and prominently displayed a union button on his work clothes from the time of the Union's election petition until the date of the election. Accordingly, we conclude that Bruns' mere reference to that stance did not tend to convey the impression that management had acquired sensitive information from unknown sources, and we reverse the finding that this reference violated the Act. Likewise, the rally at which Buchanan spoke to union advocates was one of a series of similar events openly held at an entrance gate that was used by both employees and supervisors. Because employees who engaged in these activities were aware that they were in plain view of supervisory personnel who frequently and appropriately passed by the rally site, Nelson's statement that he had seen Buchanan in conversation there did not tend to imply that management had been engaged in covert observation. Accordingly, we reverse the finding that this portion of Nelson's remarks violated the Act.

3. The judge concluded that the Respondent's unlawful conduct warranted a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1975), a conclusion which we affirm.[2] The General Counsel, however, excepted to the judge's apparently inadvertent failure to determine on what date the Respondent's bargaining obligation began. The General Counsel argues that the duty to bargain arose on 21 October 1981, but we shall date

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In affirming the judge's imposition of a bargaining order, we find it unnecessary to rely on his finding that the work force constituted a "small unit." Furthermore, in view of the fact that the Union enjoyed a card majority before the election and that the Respondent's conduct clearly had "the tendency to undermine majority strength and impede the election processes," we find it unnecessary to reach the judge's further finding that the unfair labor practices were also the so-called Category I "outrageous" and "pervasive" variety. See *Gissel*, 395 U.S. at 613-614. We do not adopt his definition of category I *Gissel* cases. See our respective opinions in *Gourmet Foods*, 270 NLRB 578 (1984).

the bargaining obligation as of 27 October 1981. The judge found that the Union attained majority support on 20 October, that it mailed a bargaining demand to the Respondent on 21 October, that the Respondent began committing unfair labor practices on either 21 or 22 October, and that it received the bargaining demand on 27 October. Because the record does not disclose any unfair labor practices that occurred before the demand's receipt that are not otherwise individually remedied by the following Order, we conclude that the Respondent's bargaining obligation began on the date that it received the Union's majority-supported demand and was simultaneously engaging in unfair labor practices calculated to undermine that support. See *Doug Hartley, Inc.*, 255 NLRB 800, 801 (1981).[3]

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusions of Law 7 through 10, and renumber present Conclusions of Law 9 and 10 accordingly.

"7. The following employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> "All production and maintenance employees employed by Respondent at its Valeski, Ohio mine, preparation plant, loading facility, and repair shop, including reclamation employees, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

"8. Since 20 October 1981, the Union has been designated by a majority of the employees in the above-described unit as their exclusive representative for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

"9. By virtue of the misconduct occurring between the filing of the election petition on 23 October 1981, and the election on 29 December 1981, as set forth above, the Respondent has interfered with a free election.

"10. By refusing on 27 October 1981, and at all times thereafter, to recognize and bargain with the Union, and by committing serious unfair labor practices to that end, the Respondent has violated Section 8(a)(5) and (1) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Swan Coal Company, McArthur, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNSI, Administrative Law Judge. Cases 9-CA-17926 and 9-RC-13948 were first tried in Athens, Ohio, on November 8, 9, and 10, 1982. After completion of the hearing, a new complaint was issued in Case 9-CA-19032. Pursuant to a motion filed by the General Counsel, I issued an order consolidating the latter case with the original one and reopened the matter for another hearing. The second hearing was held on April 18 and 19, 1983, in Athens, Ohio.

The consolidated complaint alleges that Respondent violated Section 8(a)(1) of the Act by various acts of coercion, Section 8(a)(3) and (1) of the Act by discharging three union adherents, laying off some nine other employees, and other acts and conduct, all for discriminatory reasons, and Section 8(a)(5) and (1) of the Act by failing to bargain with the Union which had obtained authorization cards from a majority of Respondent's employees. The General Counsel seeks a bargaining order because it asserts that Respondent's unfair labor practices improperly interfered with a representation election held among the employees on December 29, 1981, and preclude a free election. The Charging Party Union filed objections to the election which ended in a tie vote of 15 for the Union and 15 against. There were no challenged ballots. Respondent denies the essential allegations in the complaint. The parties filed two sets of briefs which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Ohio corporation, is engaged in the mining of coal at its facility in McArthur, Ohio. During a representative 12-month period, Respondent had purchased and received products, goods, and materials valued in excess of $50,000 from other enterprises located in the State of Ohio, each of which other enterprises received such products, goods, and materials from points outisde the State of Ohio. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Charging Party Union (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

[3] However, since we have found in agreement with the judge that the Respondent's August 1982 layoffs violated Sec. 8(a)(3), we find it unnecessary to pass on the General Counsel's futher allegations that they also violated Sec. 8(a)(5).

III. THE UNFAIR LABOR PRACTICES

Some time in October 1981, employee James Dailey contacted a representative of the Union about organizing Respondent's employees. A meeting was held on October 15, 1981, at Dailey's home. Those in attendance included two union representatives and some 9 or 10 employees, including Dailey, Paul and Phillip Martin, Lester Eugene Haybron, Eddie Mullins, Jack Allberry, Rick Zimmerman, and Leonard Burris. At the meeting a number of the employees signed cards authorizing the Union to represent them. At a subsequent meeting in Logan, Ohio, in late October, more cards were signed. Prounion buttons, signs, and bumper stickers were also distributed at the Logan meeting.

In late October, some employees began to wear union buttons openly at Respondent's mine site. Employees Phil and Paul Martin, Dailey, Haybron, Burris, Zimmerman, Allberry, Gene Coleman, Virgil Jackson, and Donnie Waldren all wore buttons. With the exception of Allberry, who was a mechanic, most of the employees who wore union buttons were equipment operators. Several of the employees, including the Martins, Zimmerman, Haybron, Jackson, and Allberry, also placed bumper stickers on their cards or trucks which were parked on Respondent's premises during the working day. Haybron also placed prounion stickers on his lunchbox and thermos.

By October 20, 1981, 16 of Respondent's 30 employees had signed cards authorizing the Union to represent them in collective bargaining. By letter dated October 21, 1981, the Union informed Respondent that it represented a majority of the employees and requested that Respondent recognize and negotiate with it. The letter was received on October 27, 1981. The Union also filed an election petition with the Board on October 23, 1981; it was received by Respondent on October 28, 1981.

Throughout the period between late October and late December, when the Board-conducted election was held, the prounion employees met regularly before work for rallies on public property near the sole entrance to Respondent's mine. At these rallies signs were displayed and union materials were distributed. Respondent's supervisors and management officials who drove by the entrance were able to observe the employees engaged in union activity.

A. *The Alleged Violations by Mine Manager Ernest Bruns*

Paragraph 5 of the complaint alleges numerous violations on the parts of Bruns. Most of the allegations were supported by the testimony of employee witnesses. They were generally credible and candid witnesses whose testimony was not impeached on cross-examination. Bruns essentially made general denials that he had ever made the coercive statements attributed to him. In some cases he responded to questions of counsel phrased in terms of whether he could recall any such incidents. He generally was not as detailed or candid in his testimony as were the employee witnesses. Based on my assessment of his unreliability as a witness, and in view of the testimony of several employee witnesses that he did engage in coercive conversations with employees, I do not credit Bruns.

Eugene Coleman testified that in October, about the time he signed a union authorization card, Bruns approached him on the mine site and asked him if he knew anything about the Union. Coleman said he did not. Bruns also asked if anyone had approached him to sign a card. Coleman replied in the negative. Bruns then asked Coleman to tell him if anyone did approach him and to "tell him who they were." Coleman replied that he would. He also instructed Coleman not to sign a union card. Bruns further accused the men of "stabbing him in the back." There is also testimony from Eugene Coleman that Bruns approached him and employee Woody Zinn on another occasion shortly before the election. Bruns spoke to them about the Union and he said, according to Coleman, "We'd better straighten up because we wasn't going to be working at any other mine, because they knew who was working at Swan and who wasn't."[1]

Bruns' remarks to Coleman constitute unlawful and coercive interrogation. Also unlawful was Bruns' request that Coleman report to him the identity of people who approached him about the Union. See *Arrow Automotive Industries*, 256 NLRB 1027, 1033 (1981). Finally, Bruns' threat that the employees would not work in another mine because of their union activity not only suggested blacklisting but also carried the implied threat of discharge. They would have no reason to fear blacklisting unless they lost their jobs. Such conduct is unlawful. See *Captain Nemo's*, 258 NLRB 537, 541 (1981).

On October 21 or 22 Bruns was in the scale house with several other employees. Employee Leonard Burris walked in and Bruns asked him for his father's phone number. Burris asked why and Bruns said, "I hear you're the main instigator of this union bullshit." Bruns said that he wanted to let Burris' father know what was going on. Bruns also told Burris he would be "blacklisted" and unable to get a job in any strip mine in the area. Bruns also stated that even if Burris obtained unemployment compensation benefits, they would "run out" and he would be "without anything." Burris denied he had any knowledge of union activity.[2]

Bruns' remarks set forth above clearly establish a violation of Section 8(a)(1) in that they create the impression of surveillance. See *Overnite Transportation*, 254 NLRB 132, 133 (1981). In addition, Bruns' threat that

[1] Coleman's testimony was not contested on cross-examination and he appeared to me to be an honest witness. Bruns did not specifically controvert Coleman's testimony except that aspect of it in which he is accused of threatening the blacklisting of Coleman and saying that union supporters were stabbing him in the back. Bruns also testified that his conversation with Coleman dealt primarily with the latter's desire for more hours. As I have indicated, I did not find Bruns to be a credible witness. I therefore credit Coleman's testimony.

[2] The above is based on the testimony of three employee witnesses, Burris, Dailey, and Waybright. Bruns' testimony is not significantly at odds with the above except that he tended to downplay the antiunion character of his remarks. Bruns testified that he told Burris, "I want to talk to your father. He got you the job here, and now you're getting into something here that you're going to raise the costs of the mine approximately $4 a ton, which the mine cannot bear." He did not controvert the testimony concerning Burris being "blackballed." To the extent that Bruns' testimony differs from that of the mutually corroborative testimony of the employee witnesses, I do not credit it.

Burris would be blacklisted by other employers for his union activity had the reasonable tendency to coerce him.

There is also evidence that Bruns interrogated and threatened employee Delmar Waybright the same day as the confrontation between Bruns and Burris. According to the credible testimony of Waybright, Bruns asked him if he had signed a card for the Union. Waybright said, "No." Bruns told Waybright to get off his "duff and put a stop to this" or the mine would close down. Bruns testified that he could not recall ever asking Waybright if he had signed a union card but was not asked about the remainder of Waybright's testimony. I found nothing that would impeach Waybright's testimony. I thus credit his testimony.

Bruns' interrogation of Waybright was not based on any lawful purpose and was accompanied by a threat of closure of operations. The threat was unaccompanied by any factual basis which would attribute it to reasons other than retaliation for union activity. Accordingly, I find both the interrogation and threat of closure unlawful violations of Section 8(a)(1) of the Act.

Employee Jack Allberry testified that Bruns spoke to him about his involvement with the Union only one time. This was in November near the shop where he was working. Bruns stated that several nonunion employees did not "appreciate" his prounion position and that he, Bruns, could not assure Allberry's "safety on the job." Foreman Willard Cumbo was also present. Cumbo said nothing at the time but disassociated himself from Bruns' remarks in a conversation with Allberry some 2 or 3 weeks later. Bruns denied ever making such a statement to Allberry. Cumbo did not testify about either the Bruns statement or a subsequent conversation with Allberry. Thus Allberry's testimony on this latter point was uncontroverted. Accordingly, and because I found Bruns not to be a reliable witness, I credit Allberry's account of the entire conversation with Bruns.

Bruns' statement implied that he knew and was concerned about the views of the employees concerning the Union. This created the impression of surveillance of union activities and was thus unlawful. In addition, Bruns' suggestion that Respondent would not protect Allberry from possible physical harm was also coercive. It is unclear on this record whether there was violence or threats of violence betwen pro and antiunion employees. But there certainly was no evidence that Respondent was powerless to prevent physical violence, at least on its own premises. Nor was there any reason given by Bruns as to why the remark was called for. Thus Bruns' suggestion that he would not protect Allberry was a gratuitous attempt to coerce Allberry into foresaking his union activities and an unlawful threat under Section 8(a)(1) of the Act.

At one point, in November 1981, Bruns spoke to employee Lester Haybron while he was giving the latter a ride in his pickup truck. Bruns told Haybron that whether or not the Union succeeded in obtaining representation rights "there was going to be a lot of people get hurt in it." Bruns also asked why the employees wanted a union. Haybron said "for the benefits and the money." Bruns then replied, "You can't take the wealth from the wealthy" and called Haybron a "communist."

In a related incident sometime in January 1982, after the election, prospective employee John Beck spoke to Bruns about obtaining work. He had had an earlier conversation with Bruns some 2 weeks before. On this occasion in January, Bruns told Beck that he would not be employed because he was a friend of Lester Haybron. Haybron had sent Beck to Bruns in the first place and Beck had used Haybron as a reference. Bruns called Haybron a radical and a "communist." He stated that he thought Beck was also a union supporter and he did not want Beck working for Respondent.

The above is based on the credited testimony of Haybron and Beck who were not cross-examined concerning the above portions of their testimony. Bruns' only specific testimony, which might possibly bear on this issue, was his concession that he had had conversations with Haybron but did not call him a communist. Bruns did not controvert Beck's testimony, which in one particular—Bruns referring to Haybron as a "communist"—tends to support Haybron's testimony that Bruns made the same accusation to him directly. In these circumstances, I credit both Haybron and Beck.

Bruns' remarks to Haybron were clearly unlawful. His threat that people would get hurt implied that Respondent would retaliate against the employees because of the union activity. His interrogation of Haybron in the same conversation was also unlawful as it was undertaken in the context of a threat and with no lawful purpose being given for the questioning. Such conduct therefore violated Section 8(a)(1) of the Act. Bruns' remarks to Beck were also unlawful. Bruns stated that he would not hire Beck because he knew Haybron and the implication was that Bruns suspected Beck was prounion as was Haybron. The statement that an employer would refuse to hire an applicant because of real or suspected union affiliation is violative of Section 8(a)(1) of the Act.

According to the testimony of employee Eddie Buchanan, Bruns approached him and other employees on one occasion before the election and told them that they had to vote against the Union "if we wanted to keep our jobs." He also attributed to Bruns the statement that "before the union was voted down, that he would have 15 new faces out there." Buchanan was not cross-examined on this point. Bruns testified he would not recall much about his conversations with Buchanan but denied telling him "there would be 31 new faces around here."

I find, based on Buchanan's testimony, which I found credible on this point, that Bruns told employees that they should vote against the Union if they wanted to keep their jobs. This statement was an unlawful threat of retaliation violative of Section 8(a)(1) of the Act. I am unable to determine what else was said about new faces on the job but I believe something to that effect was mentioned. Even though I do not make specific findings on that aspect of Buchanan's testimony, I believe something was said about new faces and this reinforced his testimony that Bruns meant to threaten the employees with loss of work.

In November 1981, Bruns had a conversation about the Union with employee Anthony Breeze. Bruns told Breeze that Respondent could not afford the Union and that he should not be involved in union activities. According to Breeze, Bruns also told him that he "might be able to get a raise or would be getting a raise . . . ." Breeze did not elaborate any further on the conversation. Bruns testified he did not recall any such conversation.

Even accepting Breeze's testimony, I do not find a violation in Bruns' remarks. Breeze's testimony concerning a possible raise was sketchy and not placed in context. I am thus unable to conclude that a raise was promised to Breeze if he abandoned the Union.

B. *The Violations Committed by Owner James Graham*

Several employees testified concerning a speech made by James Graham, the owner of Respondent, on December 28, 1981, the day before the election, to assembled employees. Their testimony, which was mutually corroborative and credible, establishes that Graham argued that he could not afford to pay union wages and that he showed employees copies of his tax returns to support the position that his was a marginal operation. Graham also told employees that he would not bargain with the Union if the employees selected it. He also stated that, if the employees did select the Union, he would close the mine and bring in a construction company also owned by him to reclaim the land. Graham also told employees that, if they tried to find other jobs after leaving Respondent, they would not be able to find work because their union activity would be known to other employers in the area. He stated that the employees would have the "kiss of death" on them.[3]

Graham's remarks in his speech to employees amounted to unlawful threats of closure of operations. His assertion of economic peril was not supported in this hearing by any factual basis or documentary evidence. There was no assertion that the closure would be caused by circumstances outside his control. Nor was it shown that union representation itself would cause any kind of economic difficulties. After all, the only result of a favorable union vote was a requirement that Respondent bargain with the Union. Graham's threats were thus violative of Section 8(a)(1). See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Graham even rejected negotiations. His statement that he would not negotiate with the Union, even if it won the election, was also violative of Section 8(a)(1) in that it demonstrated a refusal to abide by the law and demonstrated to employees the futility of supporting the Union. Finally Graham threatened that employees would be blacklisted and would not be able to find employment if they selected the Union. Such threats are coercive and violative of Section 8(a)(1) of the Act.

The next day, the day of the election, Graham approached a number of the operators, called on them to meet with him in the pickup truck he was driving, and talked to them individually about the election. Nine employees testified that he made coercive statements to them. Their testimony is mutually corroborative. Graham himself concedes that he questioned these employees about their union activities. Many of his statements to employees were repetitive of the unlawful remarks Graham made in his speech the day before. In view of my credibility determinations concerning the speech of the day before, I credit the testimony of the employee witnesses.

Graham told five employees, Phil Martin, Virgil Jackson, Breeze, Waldren, and Burris that he would close the mine if the Union won the election. In the course of a 45-minute conversation, Graham told Jackson that he would never sign a UMW contract and, if Jackson supported the Union, he would never get a job in any other strip mine in the area. He also threatened employee Buchanan that Buchanan would lose his job if he voted for the Union. Such threats were similar to threats made by Graham the day before and are clearly unlawful.

Graham told employee Jackson that things would be better if the Union lost the election. He told employee Dailey that working conditions would improve and that Graham would think about paying the employees more money if the Union were defeated. Graham also promised employee Delmar Waybright he would "take care" of him if the Union were defeated. This statement came after Waybright told him, in response to a question from Graham, that he did not support the Union. Graham also asked employee Zimmerman why he supported the Union and why Zimmerman had not contacted him directly for a raise. Graham's questioning of employees was unlawful as it was not done for any lawful purpose, was not accompanied by assurances against reprisals and was undertaken in the context of other unfair labor practices. His promise of benefits to employees were also violative of Section 8(a)(1).[4]

C. *The Violations Committed by Foreman Willard Cumbo*

The complaint alleges that Respondent violated the Act by ordering employees to remove union posters and

[3] Graham's denial that he referred to negotiations or the likelihood of Respondent ceasing operations came in testimony which I considered evasive, self-serving, and lacking in candor. His testimony cannot be credited over the mutually corroborative testimony of employee witnesses. Moreover, his testimony conflicts with, or at least is not corroborated by, that of other management officials who were present and testified about the speech. Bruns testified that he could not recall in any way what Graham said in his speech; yet Graham claimed that Bruns answered some questions from employees during the speech at Graham's request. Cumbo also testified he could not recall the statements attributed to Graham by the employee witnesses. Cumbo did admit on cross-examination that Graham said that "I will not personally negotiate with the UMW." This tends to corroborate the employee witnesses and refutes Graham's testimony. Supervisor Gary Nelson was asked only if Graham said he would close the mine. Nelson testified Graham did not say that, but said only that he could not afford to run it under the Union. Nelson admitted that he told employees that he believed Graham would close the mine in conversations with them dealing with the Union. I view Nelson's testimony as somewhat supportive of that of the employees, particularly since he did not refute the testimony that Graham threatened to blacklist employees and that he would not bargain with the Union.

[4] I do not believe that Graham's remarks to employee Zimmerman constituted an unlawful solicitation of employee grievances. Nor do I find it unlawful that Respondent kept a list of employees names with their union affiliation next to them. Phil Martin saw it while Graham was talking to him in the truck but there was no reference to the list. In both situations I have found other aspects of Graham's remarks unlawful.

bumper stickers from their private vehicles which were parked on Respondent's premises during the workday. It is uncontradicted that Foreman Willard Cumbo told employee Burris to remove a prounion sign from his car, sometime in October 1981. It is also uncontradicted that shortly after the election, Cumbo told employees Virgil Jackson and Lester Haybron to remove prounion bumper stickers from their vehicles.

Displaying prounion signs on private vehicles is protected concerted activity. There is no evidence that displaying the signs interfered with discipline or production since the employees' vehicles were parked where employee vehicles were normally parked on the employer's premises. There was no legitimate business reason advanced for preventing the employees from displaying prounion signs on their private vehicles. Thus Respondent's prohibition against displaying prounion signs was improper interference with protected activity and violative of Section 8(a)(1) of the Act.

Prior to the union campaign, the Respondent kept no specific records concerning tardiness and absenteeism. On or about December 15, 1981, Foreman Cumbo announced to employees that Respondent was changing its policies concerning tardiness and absenteeism. He stated that he was starting to keep written records of absences and tardiness and that these records would be available to future employers should the employees leave Respondent. This program was implemented, according to Cumbo, and it was his idea.

Cumbo testified that he announced and implemented the new recordkeeping policy because "we were having a problem with tardiness, absenteeism, quitting before quitting time, the breaks they were taking were too long." He estimated that Respondent was losing 30 to 40 minutes per day of production time per man because of lax attendance and absenteeism. On cross-examination, Cumbo admitted he had no basis for this estimate except "adding it up in my head." He also admitted that he did not watch each employee report to work on his return from lunch. Moreover, Respondent submitted no documentary evidence to support Cumbo's testimony. Nor did Cumbo or any other management official offer any specific evidence of legitimate absenteeism and attendance problems. It does not appear that Cumbo enforced his policy change after the election. He testified that on January 10, after the election, several employees came in from their work areas early for lunch and he made no notations in the files of the employees. Cumbo testified that he kept records pursuant to his change in policy, although they were very limited records, and that the recordkeeping procedure was still going on. It seems obvious to me, in analyzing Cumbo's testimony, that he had no serious and legitimate business concerns in announcing and implementing the recordkeeping changes. His testimony on this issue was not credible or reliable. I do not believe that Cumbo announced or implemented this change in policy for the reasons he stated.

In view of my rejection of Cumbo's testimony on this point and his reasons for announcing and implementing a change in recordkeeping policies and in view of the other unfair labor practices committed by Cumbo and Respondent's other officials involving retaliation against employees for supporting the Union, and in view of the timing of the change shortly before the union election, I find that the change was undertaken to coerce employees in violation of Section 8(a)(1) of the Act.

In November 1981, Respondent announced and implemented a new policy on employee breaks. Prior to that point, the employees took breaks at 9 a.m. and 3 p.m., and employees were permitted to take their breaks together. Foreman Cumbo announced the change in policy to employees. Under the new policy employees were to take their breaks, individually, on a staggered basis. The rule was also applied to the two employees on the night shift who were not permitted to take their breaks together. On the day Cumbo announced the change, employee Haybron asked Cumbo why the break system was changed. Cumbo said the change was made because "there was too much talk about the union during breaks." Haybron's testimony concerning this conversation was uncontradicted.

About 2 or 3 weeks later the old individual break system was put back into effect. No reason was given to the employees for the reversion to the old system. Cumbo, however, testified that the new staggered breaks lasted some 3 hours and he could not police the breaks.

The evidence is overwhelming that the staggered break system was announced and instituted to curtail union activity. Cumbo admitted as much to employee Haybron. Owner James Graham also conceded that the change was instituted because Bruns and Cumbo "were trying to keep the people from an election hearing and—and were trying to get more productivity out of the mine."[5] In addition, the change in policy came about shortly after the union activity began and in the midst of numerous unfair labor practices. There is also evidence that Cumbo failed to enforce the new rule when he observed nonunion employees taking their breaks together.

Respondent's contention that there was a productivity based reason for the change is without merit. No such reason for the change was mentioned to employees, and common sense, as well as Respondent's rather quick reversion to the old system, demonstrates that, if anything, the change hurt productivity. In many cases, the machines had to work in tandem and, if one operator was on a break, the other machine operator could not perform at full efficiency. Cumbo himself admitted that the staggered breaks caused problems. In these circumstances, Respondent's change in break policy violated Section 8(a)(3) and (1) of the Act. Moreover, Cumbo's statement to Haybron that the change was occasioned by "too much talk about the union" independently violated Section 8(a)(1) of the Act.

Employee Eugene Coleman testified that, in several conversations with him in November 1981, Foreman Cumbo questioned him about the Union. Cumbo asked Coleman how he felt about the Union. When Coleman answered that he thought the Union was "pretty strong," Cumbo responded, "If that's the way its going to be,

[5] It is likely that there is a transcript error in the above quote. "An election hearing" should probably read "electioneering." In either case, however, it appears that the change was instituted because of the Union's presence on the scene.

there will be 31 of you going down the road talking to yourself." Employee Delmar Waybright testified that, on four or five occasions, Cumbo told him that Respondent would close the mine if the Union won the election. Waybright and Coleman have been found to be credible witnesses in other aspects of their testimony and there is no reason to discredit their testimony as to these conversations. Cumbo denied threatening employees that the mine would close or that they would lose their jobs. However, I did not find Cumbo to be a reliable witness. He was evasive in testifying that he could not recall talking to employees about the Union and that the employees brought up the subject. In addition, his explanations concerning why he implemented certain changes in policy during the preelection period did not withstand scrutiny. Moreover, Cumbo's remarks were similar to unlawful comments made by Bruns and Graham. Therefore, I do not credit Cumbo's general denials that he threatened employees.

Cumbo's interrogation of Coleman was accompanied by a threat that 31 employees would be "going down the road" if the Union won the election. The latter was an implicit threat that employees would lose their jobs. He also threatened Waybright that the mine would be closed. The threats of retaliation were violative of Section 8(a)(1) and the interrogation of Coleman in the context of a threat was also unlawful.

Coleman also credibly testified that, on the day of the election, Cumbo told him and employee Woody Zinn that there would be no jobs for them if the Union won the election. This was similar to other threats by other management officials and Cumbo himself. It was thus an independent violation of Section 8(a)(1) of the Act.

D. *The Violations Committed by Supervisor Gary Nelson*

Employee Buchanan testified without contradiction that he complained to Supervisor Gary Nelson about his hours being cut in October 1981. Nelson answered that he and Bruns felt that Buchanan was prounion and that Buchanan would work a full week only if he convinced Bruns he was not prounion. Buchanan also testified, without contradiction, that Nelson told him that the mine would be closed down if the Union won bargaining rights. Nelson himself testified that, in numerous conversations about the Union with employees, he told them that he believed Graham would close the mine. Finally, Buchanan also testified, without contradiction, that, on another occasion, Nelson asked him why he stopped to speak with prounion employees assembled at the entrance gate to the mine. Buchanan told Nelson he simply wanted to find out what was going on. Nelson then asked him to "stop by again" so he could let Nelson "know what was going on."

The above uncontradicted testimony establishes that Respondent violated Section 8(a)(1) of the Act by interrogating employees about union activities, threatening closure of the mine if the Union won representation rights, and announcing that an employee's hours were reduced because he supported the Union. Nelson's remarks also created the impression that union activities were being observed and were thus violative of the Act. Nelson's request that Buchanan report to him what he observed after talking with prounion employees was also violative of Section 8(a)(1) of the Act.

E. *Miscellaneous Violations*

1. Announcement of reduction and actual reduction in work hours

On October 28, 1981, the Respondent reduced the hours of a number of the employees from 58 hours a week to 30 hours per week. This reduction remained in effect for about 2 or 3 weeks. The General Counsel alleges that the reduction itself was unlawful and violative of Section 8(a)(3) and (1) of the Act because it was discriminatorily motivated and he also alleges that the announcement of the reduction was unlawful.

Respondent gave no reason to the employees for the reduction of hours. Employee Coleman's uncontradicted testimony is that he asked Bruns on the day the announced cutback of hours was made the reason for it. Bruns replied that it was "because of the union." Bruns said that if the "union got in" the mine would be shut and that Respondent had "700 tons surplus that they was going to get rid of before the election." In addition, Bruns testified at a Board representation case hearing on November 12, 1981. Many employees were present at that hearing. Bruns was asked why the reduction was effectuated. This was his answer:

> Well, when the boys started wearing UMWA badges and so forth, why Mr. Graham, said well we better use up our inventory of coal. So we didn't need to strip six days a week.

The above clearly shows that, in his statements explaining the action, Bruns attributed the reduction in hours to the onset of the Union. Such statements suggest retaliation because of union activities and are thus classic violations of Section 8(a)(1) of the Act.

The evidence is also clear that the reduction itself was unlawful. Bruns' statements concerning the reason for Respondent's action are admissions of illegal motive. In addition, the timing of the change shortly after Respondent first learned of the onset of union activity and the fact that Respondent committed numerous other unfair labor practices suggesting retaliation for such activities confirm the discriminatory character of the action. Not only was no explanation given to most employees for the reversion to the 58-hour-per-week schedule, but the fact that the reduction in hours lasted only 2 or 3 weeks, refutes any economic justification for it. Moreover, James Graham's attempt to explain the reduction not only failed to withstand scrutiny but confirmed the discriminatory character of the action. He admitted that once the Union appeared on the scene he decided to reduce inventory preparatory to shutting down the mine. Respondent submitted no documentary evidence to show that the inventory of coal was at unsually high levels or that there was a need for a reduction of purely economic reasons. Moreover, there is evidence that employee Buchanan had his hours cut and was told by Supervisor Nelson that he could escape the reduction in hours if he

told Bruns he was not a union supporter. Buchanan did so and, as a result, he worked a full week. The evidence is thus overwhelming that the reduction in hours was implemented for discriminatory reasons in violation of Section 8(a)(3) and (i) of the Act.[6]

2. Sending union supporters home early

The General Counsel also alleged that Respondent violated the Act when it sent two prounion machine operators home after a mechanical breakdown, contrary to past practice. The evidence shows that normal procedure during a mechanical breakdown is that the operators remain at work to assist the mechanic or operate other equipment, although at times in the past machinists had also been sent home. Two operators, Phil Martin and Lester Haybron, testified that, on two separate occasions on December 3, 1981, their machines broke down and they were sent home. Martin was sent home at noon and Haybron was sent home at about 2:30 or 3 p.m. Martin testified that before he went home he saw a nonunion employee waiting for his equipment to be repaired.

It is true that Martin and Haybron were known union adherents who were subsequently discharged. It is also clear that Respondent was intent on defeating the Union and retaliating against union supporters. However, there is no evidence which would show a causal connection between the union activity of Martin and Haybron and the fact that they were sent home when their equipment broke down on December 3. Both returned to work the next morning. In Haybron's case the supervisor of mechanics, Nelson observed that Haybron did not seem to want to help the mechanic and the repairs were going to take the rest of the day. He did not beleive it useful to keep Haybron around and there were no spare machines for Haybron to work on. Nelson testified that "he wasn't doing me no good" so he suggested that Cumbo send him home. I find the explanation plausible and I cannot attribute any antiunion motivation to Nelson in this instance. Martin's testimony on this point was as follows: "It was the first day of deer season. And I had a flat, and the foreman kind of told me to go home and go deer hunting." Cumbo testified that he could not recall ever having sent Phil Martin home. Moreover, it appears that there were no spare machines available on December 3. In view of my finding that the treatment of Haybron on December 3 was not discriminatory and, because I consider Martin's testimony on this point to be ambiguous, I do not believe that the treatment of Martin was improper. It appears that, in both cases, the employees were perfectly willing to take the rest of the day off and there is no evidence that they were penalized for their union activity.

Accordingly, I find that the General Counsel has not proved that Respondent discriminated against Martin and Haybron when it sent them home before the end of the workday on December 3, 1981.

3. Discrimination against Jack Allberry

The General Counsel also alleged that Respondent violated the Act by reducing mechanic Jack Allberry's customary truck allowance and granting him a smaller pay raise than other employees.

Allberry used his private truck in performing his work. Respondent paid him for the use of the truck. It is undisputed that Respondent's rental payment was cut in November and December 1981. According to Allberry, the rental payment was "cut in half" because "they was going to start basing our truck rental on the amount of hours we worked instead of by the month." Allberry's cut in rental payments lasted a "couple of months" whereas the cut in hours lasted just 2 or 3 weeks. No explanation was given for the return to the original method of computing the rental payments.

In view of Respondent's discriminatory action in cutting the hours of employees and because Allberry was informed that the cut in truck-rental payments was related to the cut in hours, it is a fair inference that the cut in truck-rental payments was likewise discriminatory. Allberry was the only mechanic who regularly wore union buttons to work and he placed a bumper sticker on his truck. He circulated union cards and participated in numerous union rallies. Bruns knew of Allberry's prounion sympathies and had warned Allberry that he could not assure his safety on the job. Respondent offered no explanation for the cut in the truck-rental payment and none exists on this record. The cut lasted well beyond the 2 or 3 weeks that the reduction in hours lasted. In these circumstances, I find that Respondent's cut in Allberry's truck rental payment was discriminatory and violative of Section 8(a)(3) and (1) of the Act.

There is also testimony that Allberry, who was the most senior mechanic, did not receive the normal pay raise which was given to all employees in January 1982. He received a 50-cent-per-hour increase instead of $1-per-hour raise received by other mechanics. Allberry complained to Graham about this and, the very same day he complained, Allberry, was notified that he would get the full $1 increase. According to Allberry, this disparity in wages lasted for "a couple or three weeks." The only explanation Allberry received for his lower raise was from Bruns who said he received less because "anybody else on the job could do anything I would do." This was contrary to uncontradicted testimony by Allberry concerning his own experience and his duties. At the hearing, Respondent offered no other explanation for Allberry's lower pay raise.

In view of Allberry's known union activity, the other discrimination against him in the matter of his truck rental payments and the failure of Respondent to explain its disparate treatment of Allberry, the most senior mechanic and the best known union supporter among the mechanics, I find that Respondent's delay in granting Allberry a full pay raise was violative of Section 8(a)(3) and (1) of the Act.

[6] In view of my finding that the reduction of hours in and of itself was discriminatorily motivated, it is of no import that certain nonunion employees may also have been affected. See *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964). Any dispute concerning the number and identities of employees affected or the amount of backpay due is to be resolved in the compliance phase of this proceeding. See *NLRB v. Ironworkers Local 433*, 600 F.2d 770 (9th Cir. 1979), cert. denied 445 U.S. 915 (1980).

F. *The Discharges of Phil Martin, Haybron, and Zimmerman*

On January 21, 1982, Respondent fired operators Philip Martin, Lester Haybron, and Richard Zimmerman. The General Counsel alleges that the discharges were discriminatorily motivated. Respondent alleges that the discharges were for cause. I agree with the General Counsel.

The three discharged employees were known union adherents. All wore prounion buttons at work and placed prounion bumper stickers on their cars or trucks. They participated in the union rallies at the entrance to the mine, handing out literature and carrying signs. Haybron and Martin were particularly vocal in asking questions during Graham's December 28, 1981 speech to employees. Haybron suggested that the employees could get a raise if Graham sold "UMW coal" and, after Graham pleaded economic problems, he said he had "never heard a rich man yet say that he had any money." When Graham said something about people cutting "your nuts for a dime," Martin retorted that the employees knew how that felt. Graham responded "what," and Martin repeated his statement. Phil Martin was also the Union's observer during the December 29 election.

On January 21, 1982, Graham made another appearance at the mine site. He spoke to the employees early in the day. He announced a pay raise for employees and told them that they would be informed of the amount of the pay raise by the supervisors. Graham's own testimony shows his continuing concern about the Union and its supporters. According to Graham, "the labor force did not continue to—or just meld together" after the election. He referred to the work force as "bifurcated. Those were the union, not union, still fussing." Graham also noted that other mines, one of which was the object of a union campaign, had given raises to its employees. He told the employees that "unless they worked together and quit the tomfoolery and really get to work and produce, I didn't know how much longer we could stay in business." Graham remained at the mine for the rest of the day.

On that same day, Cumbo told Martin and Zimmerman to move their pans to a location where they would be working with Delmar Waybright who was operating a dozer. Waybright had signed a union card on November 12, but he did not wear prounion insignia at work. Graham had reason to believe that Waybright was against the Union. It appears that his sister owned the land the mine was situated on and leased it to Respondent. In a conversation with Graham on the day of the election, Waybright answered Graham's interrogation by stating, "I don't like the union, and never did." He also assured Graham that he could be counted on to vote against the Union and was told that Graham would "take care of" him.

About 1:30 p.m. on January 21, Phil Martin's pan developed a steering problem. Martin stopped his machine which had blocked Zimmerman's pan. Both employees stepped down off their machines and surveyed the problem. They spoke for 2 or 3 minutes, then returned to their machines and continued working. At this point, Waybright, who was working nearby, also left his machine and undertook to clean mud off its tracks. He was off his machine for about 30 minutes.

Later that same day, about 2 p.m., the two pan operators, Martin and Zimmerman, were having difficulties removing material because of the hard surface. It was necessary to have Waybright help them by "ripping" the surface with his dozer. Martin and Zimmerman dismounted their pans, as did Waybright, and communicated with Waybright as to what they wanted him to do. There is much evidence that operators must dismount their machines to communicate in such situations and that this occurs several times a day. Martin told Waybright what he wanted him to do and Waybright agreed. The conversation lasted about 2 or 3 minutes.[7]

According to Cumbo and Graham, they were surveying the area in Cumbo's pickup truck, when they observed Martin and Zimmerman off their machines. They did not see Waybright who was also off his machine when the other two operators had dismounted. Neither Cumbo nor Graham stopped and talked to any of the employees. They did, however, decide to fire Martin and Zimmerman for being off their machines.

About 3 p.m., about 1 hour after having observed Martin and Zimmerman, Cumbo returned to their worksite and told them that Graham had seen them stopped and decided to fire them. They both rode back to their cars with Cumbo. Martin explained that they were off their vehicles because they had to communicate with Waybright. Martin also asked about Waybright who had also been off his equipment. Cumbo stated, "Well, they say that you were holding Delmar up. He was waiting on you. You was the one that got them all stopped." Zimmerman said to Cumbo, "Well, you know why this is," and Cumbo responded affirmatively.

That same day Respondent fired Lester Haybron. During the Cumbo-Graham drive around the mine site, they went to where Haybron was working. According to Graham, Cumbo told him Haybron was one of the best operators but said that he was "nothing but trouble." Cumbo described the "trouble" with Haybron as an "attitude" problem, mostly in questioning Cumbo's judgment on how to proceed with his work. Graham and Cumbo testified that, on this occasion, they observed Haybron fill up his pan with only partial loads. According to Cumbo, "one of his favorite tricks was to get a pan of dirt, go half way out with it, dump it, and come back and sit." This is apparently referred to as "short dumping."

During Haybron's break, about 3 o'clock, Cumbo notified him that he was terminated, and gave him a termination slip which described his work as unsatisfactory. When Haybron asked what caused his discharge, Cumbo responded by asking, "Who was here today?" Haybron also said he knew "what this is all about" and Cumbo agreed, "I'm sure you do." Haybron then asked about the "unsatisfactory work" notation on his discharge slip. Cumbo responded, "I had to put something down." Haybron pressed Cumbo for a reason. Cumbo then men-

[7] The above is based on the mutually corroborative and credible testimony of the employees involved.

tioned Haybron's alleged "short dumping." Haybron gave Cumbo an explanation and Cumbo agreed that Haybron had a good point. Haybron also told Cumbo he was going to take his discharge "to court." Cumbo said that Haybron had a good case.

Haybron and Martin spoke to Cumbo later in the day. Cumbo spoke to them separately. He told Martin that he and Zimmerman "got screwed." He also told Haybron that he was "one of his best pan operators" and that he would try to get Haybron put back to work. Still later, according to Zimmerman, he visited Cumbo at home. Cumbo told him that he had gotten a dirty deal. The next day, Cumbo spoke to Waybright and told him that Martin and Zimmerman had been fired for being off their equipment and that there had been a charge that Waybright had also been off his equipment. He then told Waybright that if he admitted he was off his equipment talking to Martin and Zimmerman he would have to fire Waybright. Waybright denied he had been off his equipment.

The above postdischarge conversations were reported by the four employee witnesses, including Waybright who had not been fired. Cumbo denied he made the statements attributed to him, although he did admit talking to at least three of the four employees. For example, he conceded that Martin told him he was going to file charges because of his discharge. The accounts of the four witnesses tended to confirm the testimony of each. Cumbo was not a reliable witness as I have explained elswhere in this Decision. His testimony concerning the objections he had to the three employees who were discharged seemed to me to be vague and unsubstantiated. In these circumstances, I credit the account of the four employee witnesses concerning Cumbo's postdischarge comments.

The evidence clearly establishes that the discharges of Haybron, Martin, and Zimmerman were unlawful. They were known and outspoken union adherents. Respondent had demonstrated union animus and threatened retaliatory action. The timing of the discharges also supports their discriminatory charcter. They all took place on one day and on one of owner Graham's rare visits to the mine. Objections were still pending to the election and Respondent could well assume that another election might be ordered. More importantly, the discharges were effectuated on the same day that Graham authorized a raise for employees. According to Graham's own testimony, he was motivated to grant the raise by a desire to stop the "bifurcated" work force which remained divided after the unresolved union election.

The circumstances of the discharges confirm the discriminatoriy motive. As for the Martin-Zimmerman discharge, neither Cumbo nor Graham spoke to the operators before they were discharged to find out why they had dismounted from their machines. Nor did they speak to Waybright, or consider firing him, although it is clear that he was off his vehicle at the same time as the other employees. This disparate treatment is explainable only because Waybright was thought by Respondent to be antiunion. In addition, there was evidence—even from Cumbo himself—that operators often were required to get off their machines to communicate. Cumbo admitted that he observed such conduct on several occasions but had never before discharged anyone for being off his equipment. Neither Zimmerman nor Martin had been warned or criticized about their work before their discharge. Cumbo attempted to show that Zimmerman had been warned prior to his discharge. But, on further questioning, it became clear that the only such instance had been a conversation Cumbo had with Zimmerman about a report from Bruns that Zimmerman had run over a big rock; Cumbo told Zimmerman to "watch the rocks" in the future and Zimmerman agreed to do so. Zimmerman had been promoted to several jobs of increasing responsibility and had worked for Respondent since 1978, well before Cumbo was hired. Cumbo also testified that he had warned Phil Martin once, about a week before, for coming in 15 minutes early for lunch. Upon further questioning, he revealed that Haybron and the rest of the crew followed Martin, all of whom were early for lunch. He made no notations of any of these matters in the personnel files of the employees. Cumbo's attempt to bolster the discharge decision based on these insignificant episodes reflects adversely on his reliability as a witness. Accordingly, I find that the reasons advanced by Respondent for the Martin and Zimmerman discharges were pretexts.

Haybron's discharge was also unusual. Neither Cumbo nor Graham was able to specify Haybron's dereliction. More importantly, if Haybron had been doing something wrong, it would have been normal—had Respondent had only legitimate business reasons in mind—for Cumbo and Graham to speak to Haybron and ask him why he was operating in the manner he did and perhaps to correct him. Yet they did not even speak to him before he was fired. Cumbo, who said that it was he who decided to fire Haybron, testified that he had talked to Haybron on previous occasions about "short dumping" and that Haybron explained that he was filling holes in the road. Although at the hearing Cumbo attributed Haybron's short dumping to an attempt to avoid work, he admitted he had never accused Haybron of this in the past. Cumbo also said Haybron began having an "attitude" problem in early January, but he admitted he never noted the attitude problem in Haybron's personnel file. Cumbo admitted that Haybron had the ability to be a good operator but stated that "with his attitude he was not." Such a vague charge was unsupported by evidence of written warnings or other disciplinary action against Haybron. And Haybron himself credibly testified that he had never been warned or criticized for his work or his attitude. Cumbo's attempt to justify Haybron's discharge is just as unreliable as his attempt to justify the discharges of Martin and Zimmerman. In view of the circumstances of the Haybron discharge which took place immediately after two other discriminatory discharges, I find Cumbo's explanations for it implausible.

Respondent's failure to establish a legitimate basis for the discharges is also supported by three separate decisions of the Ohio Unemployment Compensation Board of Review. After appropriate hearings, a Board of Review referee found, in each of the three cases, that Haybron, Zimmerman and Martin were discharged without just

cause. Although such decisions are not determinative, they are probative and of some relevance in the determination of the reasons for a particular personnel decision in Labor Board hearings. See *Western Publishing Co.*, 263 NLRB 1110 fn. 1 (1982).

In these circumstances, I find that the General Counsel has shown by a preponderance of the evidence that Phil Martin, Haybron, and Zimmerman were discharged because of their union activities and that Respondent has not shown that they were discharged for cause.

G. *The Layoffs of August 20, 1982*

On August 20, 1982, at the end of the working day and without prior notice, Willard Cumbo handed termination slips to machine operators Paul Martin, Donald Waldren, Virgil Jackson, Eugene Coleman, Delmar Waybright, James Dailey, and Leonard Burris, and laborer Richard Nickels and mechanics helper Edward Mullins, advising them that they were being laid off due to "lack of work." The General Counsel alleges that the layoffs were discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act.[8] Respondent alleges that the layoffs were the result of legitimate business considerations. I agree with the General Counsel.

All of the terminated employees, with the exception of Evans, who had been hired after the election, were active in the Union to the extent of at least signing an authorization card. Martin, Waldren, Jackson, Coleman, Dailey, and Burris were particularly active, wearing prounion buttons, displaying signs in their cars or trucks and participating in periodic rallies at the entrance to the mine. Mullins also briefly displayed a prounion badge. Only Delmar Waybright and Richard Nickels confined their union support to the signing of cards.

As I have indicated, 16 employees had signed union authorization cards by the end of October 1981. Two more signed cards by the time of the December 1981 election. Thus a total of 18 employees had signed cards. Three of the card signers were unlawfully discharged in January. As of August 20, 13 card signers remained in Respondent's employ, including 8 of its 18 operators. After the layoff was effectuated, of the 10 remaining operators, only one, Glendon Hughes, had signed a card. Hughes, however, had never manifested any outward union support. Among the other bargaining-unit employees, only three who had signed authorization cards remained. Of those, only Jack Allberry, a mechanic who was subsequently discharged, had openly supported the Union. Thus, after the layoff, of the 24 employees remaining in the bargaining unit only four authorization card signers, of which only one had been an overt supporter of the Union, were left. The effect of the layoff therefore was to decimate the remaining union support among the employees.

Additionally, a significant number of the layoffs were effectuated without any regard to seniority and the evidence is clear that Respondent did utilize seniority in its personnel policies. Eugene Coleman credibly testified that, when he began his employment with Respondent in June 1981, he questioned Ernest Bruns about the Company's policy concerning layoffs and vacations. Bruns responded that the order of layoffs and choice of vacations was to be determined by length of service. As an example, Coleman offered that in 1981 he requested certain vacation time which was denied because it had also been requested by other more senior employees. None of these assertions was challenged on cross-examination, nor was Willard Cumbo, Respondent's sole witness on the layoff issue, questioned on any of these points. This aspect of Coleman's testimony was thus essentially unrebutted. Furthermore, although there is nothing in the record concerning the details of any layoffs by Respondent prior to August 20, there is evidence that Respondent did effectuate a layoff in April 1983 involving 13 employees. On that occasion, all determinations, with the exception of one, were made according to the length of service of the employees.

On August 20, only one of the eight operator layoffs was made according to length of service, that of Jeff Evans, who was the last operator hired, having been in Respondent's employ for approximately 10 working days. Of the 10 operators who remained after the layoff, only 4 were more senior than the 7 union operators who were laid off. Of those, only one, Glendon Hughes, had signed a union card. The other six operators were not only less senior than the seven laid off, but had been hired after the December 1981 election. Thus, they were not only nonunion, but had never had any contact with the union campaign. The most senior had less than 8 months' service with Respondent.

As I have previously found, Respondent, through its highest management officials, harbored a clear animus toward the Union and its supporters. This animus was manifested through a series of unfair labor practices which I have found herein. These included not only coercive interrogations, but discriminatory reductions in hours, dismissals, and unlawful threats of dismissals and mine closure. Furthermore, at the time of the August layoffs, objections to the December election were still pending. Coupling this animus with the facts I have noted, including the prior unfair labor practices committed by Respondent, the union adherence of those dismissed, the resulting reduction of union adherents in the remaining work force, and the Respondent's deviation from its apparent policy of effectuating layoffs according to seniority, I find that Respondent's desire to rid itself of union supporters and to discourage union activity was a motivating factor in its decision to effectuate the layoff.

Respondent submits, however, that the layoff was occasioned by accumulation of a surplus of coal at the mine, which necessitated a reduction in mining personnel and thus was the result of a legitimate business consideration. I find Respondent's evidence unpersuasive.

Willard Cumbo testified that, as of August 20, there was a surplus of coal on hand, in the form of both inventory and uncovered coal in pits, also referred to as coal reserve. He further stated that there was so much uncovered coal that it was difficult for the employees to work around it. This, in turn, made it inefficient and unneces-

[8] Operator Jeff Evans, who had been hired on August 9, 1982, was also laid off on August 20. Evans was recalled in November 1982. The General Counsel has made no allegation concerning his layoff.

sary to continue mining at what was then the current pace. As a result, according to Cumbo, it was necessary to lay off a certain number of Respondent's mining personnel.

Although Cumbo testified that part of his weekly duties consisted of measuring coal reserve by pacing the open pits and then converting the square footage into tons per acre, Respondent produced no documentary evidence concerning the amount of coal on hand as of August 20 nor did Cumbo supply any precise figures. Cumbo stated that he kept his calculation on scratch paper and he had "probably" thrown them out. Cumbo further testified that on August 20 he was notified by Bruns, for the first time, that, because of the excessive amount of coal on hand, layoffs were to be effectuated that same day. Cumbo observed that he was not surprised because he "had seen it coming." He then stated that Bruns authorized him to select which employees were to be laid off and that he made such selection based solely on the individual abilities of each employee.

I reject Cumbo's testimony that the layoff was occasioned by a surplus of coal. Several employee witnesses, including James Dailey, who possessed previous experience in estimating coal reserves, testified that there was no surplus of coal on hand in August 1982. They further testified that the number of uncovered pits at the time of the layoff was no greater than in the summer of 1981, when no layoffs took place. In the absence of documentary evidence to the contrary and based on the inexactness of Cumbo's measuring techniques, I found their testimony on this point no less persuasive than that of Cumbo. Moreover, as I have previously noted, I have found Cumbo not to be a reliable witness on other matters. His testimony must be viewed as colored by his union animus. Finally, no other management official was called on to corroborate Cumbo or to testify on the necessity for the layoffs.

Other evidence supports the finding that the layoffs were not necessitated by the accumulation of a surplus of coal. First, prior to August 20, the operation of the mine was inconsistent with that of a business that was accumulating a surplus of coal. The employee witnesses offered uncontradicted testimony that, until August 20, the very day of the layoff, they were working 44-hour weekly shifts that were staggered in order to enable the mining equipment to be utilized an extra 11 hours per week.[9] This is contrary to Cumbo's assertion that on August 20 mining was difficult. During that time, according to Cumbo himself, both he and Bruns were stressing production, and the employees were involved in reclaiming operations, as well as the opening of new coal pits. At no time were the employees advised to reduce production or told that they were accumulating an unusually large surplus of coal. Neither were they advised of any impending layoffs. Their first and only notification was on August 20, when they were handed dismissal slips by Cumbo. Indeed, in uncontradicted credible testimony, Paul Martin stated that, during the summer of 1982, Cumbo told him there would be no layoffs. Likewise, also in uncontradicted testimony, James Dailey stated that during the very week of the layoff, Cumbo told him that there was an additional 6 to 7 months stripping left at the Respondent's mine. Finally, on August 9, 10 working days prior to the layoff, Cumbo hired an additional operator, Jeff Evans. These actions are hardly consistent with someone who "saw [an economic layoff] coming."

I likewise reject the assertion of Cumbo that the choice of employees to be dismissed was left to his discretion and was based on the employees' ability as operators. Leonard Burris testified that, as Cumbo was passing out the termination slips, he was asked why he was laying off out of seniority. Cumbo responded, "Orders from up above." The employees also asked him when they would be recalled. Cumbo answered, "Probably never. If you can go find a job." James Dailey testified that in a private conversation with Cumbo on August 20, Cumbo informed him that "he didn't want to lay him off, he'd argued over him" but he had "orders from higher up." Dailey further asked Cumbo if he was "that bad an operator to be laid off," to which Cumbo responded in the negative. Eugene Coleman testified that, in yet another separate conversation, when he asked Cumbo why they were being laid off, Cumbo answered, "Orders."

The testimony of these three witnesses concerning these conversations, which I credit, was neither impeached on cross-examination nor disputed by Cumbo in his testimony. In view of its unrebutted nature and of the fact that it is in conflict with Cumbo's testimony concerning the circumstances of the layoff, it further serves to impeach Cumbo's credibility. Moreover, the substance of this testimony, when considered in light of Respondent's other unfair labor practices and its failure to establish a legitimate basis for the layoff, is also indication of an unlawful motive.

The finding of discrimination is further supported by Respondent's hiring and recall practices after the layoffs. Of the 10 employees who were laid off on August 20, only 2 were recalled by the Respondent. They were Jeff Evans, who had been employed a mere 10 days prior to the August 20 layoffs, and Richard Nickels. Although Nickels had signed an authorization card, he had never manifested outward support for the Union. Furthermore, shortly after these two employees were recalled, Respondent embarked on a hiring campaign in which it hired 12 new employees, including 9 new operators. Thus, Evans and Nickels were recalled in November 1982 and the new employees were hired beginning on December 8, 1982. This hiring activity had the effect of completely replacing the prounion employees who had been laid off on August 20. None of the new hires were employed during the union campaign, and, therefore, it can be inferred that they were nonunion.

Despite unrebutted testimony that the remaining discriminatees possessed significant experience in strip mining operations, and that they had, during their employ with Respondent, performed their duties in a satisfactory manner, none was even considered for rehire. This is true, even though all were available for work, and this fact was known to Respondent. Indeed, employee Coleman testified that since the layoff he reported in

[9] Thus, when the employees worked a 44-hour shift, the equipment operated 55 hours.

person to Respondent on three occasions and telephoned on three occasions all for the purpose of seeking employment. During the period that Respondent was hiring new employees, Coleman, without identifying himself, telephoned and spoke with a person named Roger Hooper. In response to an inquiry concerning employment possibilities, Hooper stated that Respondent had recently hired two employees and was taking applications. Within 30 minutes Coleman arrived at the mine to apply for employment. Upon meeting with Cumbo and Bruns, he was told that Respondent was not hiring. The circumstances of this out of hand rejection not only refute Cumbo's testimony that he was concerned with quality when hiring new employees, but also confirms Respondent's unlawful motive in effectuating the layoffs.

Finally, Respondent introduced documentary evidence indicating that its volume of sales remained constant after the layoffs, despite an approximate one third reduction in staff. Respondent asserts that this was the result of a surplus of coal which permitted the Respondent to maintain its sales while reducing the number of mining personnel. However, Philip Martin credibly testified that during a period lasting from shortly after the layoff until approximately October 1982, on three or four separate Sundays, while passing by the Respondent's minesite he observed mining operations taking place. This testimony survived cross-examination and was not addressed by Cumbo in his testimony. It is undisputed that during the summer of 1982, prior to the layoffs, Respondent had operated on a Monday through Saturday, 6-day schedule. Thus, although Respondent reduced its staff, the evidence indicates that it may have expanded its hours of operation. Moreover, several months later, Respondent clearly had a need for more personnel as it recalled two laid-off employees and hired a substantial number of new employees. Accordingly, Respondent's evidence concerning its sales figures after August 20 is inconclusive and does not rebut the overwhelming evidence of discrimination in this record.

In these circumstances, I find that the General Counsel has shown that the August 20 layoff was discriminatorily motivated in violation of Section 8(a)(3) and (1) of the Act.

H. *The Bargaining Order Remedy*

It is not disputed that by late October when the Union requested recognition, 16 of the 30 employees in an appropriate unit signed valid union authorization cards. The following is the appropriate unit in which the election was held and in which the Union secured majority support:

> All production and maintenance employees employed by [Respondent] at its Valeski, Ohio mine, preparation plant, loading facility, and repair shop, including reclamation employees, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1975), the Board may require an employer to bargain with a union based on a card majority in two types of cases: (1) In "exceptional" cases where, regardless of whether the union has ever represented a majority of unit employees, the employer has committed "outrageous" and "pervasive" unfair labor practices of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had," and (2) in "less extra-ordinary cases," where the union has at some point attached a card majority and the employer has committed unfair labor practices which, though "less pervasive," still have "the tendency to undermine majority strength and impede the election process."

This case clearly calls for a bargaining-order remedy. Four different management officials committed unfair labor practices, including the owner of Respondent, James Graham, who rarely spends time at the mine but deviated from past practice in an attempt to defeat the Union in this case. The unfair labor practices reached all of the employees in what must be considered a small unit. The unfair labor practices were serious ones, involving the threat of closure of operations and of retaliation against employees. They extended to the period well beyond the election and included the most serious and destructive type of violation. Three employees were discriminatorily discharged and nine others discriminatorily laid off. Thus, more than one-third of the people employed at the time of the election were discriminatorily terminated.

The violations were so serious that free choice in the December election was clearly not attained. I therefore set aside the election of December 29, 1981. In addition, under either of the standards set forth in *Gissel*, supra, I conclude that traditional remedies are not sufficient to restore the situation as it existed before the Respondent's misconduct. The unfair labor practices were so pervasive that their coercive effects could not be eliminated by traditional means and they surely would continue to have the tendency to undermine union support and impede the election process. Serious violations were committed before and after the election and they are "likely to have a lasting inhibitive effect on a substantial percentage of the work force." *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980). Accordingly, a bargaining order reflecting the Union's actual majority before Respondent's pervasive unfair labor practices were committed better reflects employee sentiment than would be a theoretical free election after Respondent has polluted the atmosphere by its unlawful conduct.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities and those of other employees; by requesting that employees obtain and report information concerning the union activities of other employees; by creating the impression that union activities were under surveillance; by threatening employees with blacklisting, dismissal, and other forms of reprisal for engaging in union activity; by threatening to close operations in retaliation for union activity; by ordering employees to remove prounion stickers and posters from their cars and trucks; by telling an employee that, because of his prounion stance, it

could not be responsible for his personal safety; by promising grants of future benefits based on the Union losing the election; by stating to a prospective employee that he was not being hired because he was a union supporter; by creating the impression that union support would be futile by telling employees that it would never negotiate with the Union; by announcing and implementing a change in its recordkeeping policy concerning tardiness and absenteeism in order to discourage its employees from supporting the Union; by announcing that a new policy concerning employee breaks had been implemented to discourage employees from discussing the Union; by informing an employee that his hours had been reduced because he was a union supporter; and by announcing that a general reduction in hours was implemented because of union activities, Respondent has violated Section 8(a)(1) of the Act.

2. By implementing a change in break policy in order to deter union activity, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By implementing a reduction of work hours as a result of union activity, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. By reducing the truck allowance of employee Jack Allberry in November and December 1981, and by not granting him a full raise in January 1982, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. By discriminatorily discharging employees Phillip Martin, Lester Haybron, and Richard Zimmerman, Respondent has violated Section 8(a)(3) and (1) of the Act.

6. By laying off employees Paul Martin, Donald Waldren, Virgil Jackson, Eugene Coleman, Delmar Waybright, James Dailey, Leonard Burris, Richard Nickels, and Edward Mullins for discriminatory reasons, Respondent has violated Section 8(a)(3) and (1) of the Act.

7. By virtue of the misconduct occurring between the filing of the election petition on October 23, 1981, and the election on December 29, 1981, as set forth above, Respondent has interfered with a free election.

8. By refusing to recognize and bargain with the Union, and by committing serious unfair labor practices to that end, Respondent has violated Section 8(a)(5) and (1) of the Act. The appropriate unit is as follows:

> All production and maintenance employees employed by [Respondent] at its Valeski, Ohio mine, preparation plant, loading facility, and repair shop, including reclamation employees, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

9. The above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

10. Except as found herein, Respondent has not committed any other unfair labor practices alleged in the complaint.

THE REMEDY

I shall recommend that Respondent be ordered to cease and desist from engaging in the conduct found unlawful herein and to post an appropriate notice. I shall also recommend that Respondent be ordered to bargain with the Union and that it offer reinstatement to employees found to have been unlawfully discharged or laid off. Respondent will also be ordered to make whole all those employees who have suffered any loss of pay or compensation due to the unlawful actions of Respondent, as found herein, computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[10]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, Swan Coal Company, McArthur, Ohio, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Interrogating employees about their union activities and those of other employees.

(b) Requesting that employees obtain and report information concerning the union activities of other employees.

(c) Creating the impression that union activities are under surveillance.

(d) Threatening employees with blacklisting, dismissal and other forms of reprisal for engaging in union activity.

(e) Threatening to close operations in retaliation for union activity.

(f) Ordering employees to remove prounion stickers and posters from their cars and trucks.

(g) Telling employees that, in light of their prounion stance, it cannot be responsible for their personal safety.

(h) Promising the grant of future benefits based on the employees' rejection of union representation.

(i) Telling prospective employees that they are not being hired because they are union supporters.

(j) Creating the impression that union support is futile by telling employees that it will never negotiate with a union.

(k) Announcing that any implementation of, or change, in personnel policies is the result of an effort to discourage or limit employees' union activities.

(l) Discharging, laying off, or otherwise discriminating against employees with regard to their hire or tenure of employment or any term or condition thereof because of their union activities or in order to limit or discourage union activities.

(m) Refusing to bargain collectively with the Union as the exclusive bargaining representative in the appropriate bargaining unit set forth herein.

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[10] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). I do not order the reinstatement of employee Richard Nickels because the record shows that he was recalled in the same capacity on November 20, 1982. I do not order, however, that he be made whole for any loss of earnings he suffered.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(n) In any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain in good faith with United Mine Workers of America, as the exclusive representative of all employees in the appropriate unit set forth below with respect to rates of pay, wages and other terms and conditions of employment and if an understanding is reached, embody such understanding in a written, signed agreement. The appropriate unit is:

> All production and maintenance employees employed by [Respondent] at its Valeski, Ohio mine, preparation plant, loading facility, and repair shop including reclamation employees, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(b) Offer to Philip Martin, Lester Haybron, Richard Zimmerman, Paul Martin, Donald Waldren, Virgil Jackson, Eugene Coleman, Delmar Waybright, James Dailey, Leonard Burris, and Edward Mullins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them and employees Jack Allberry, Richard Nickels and any other employee discriminated against whole for any loss of earnings, benefits or compensation connected with their employment status they may have suffered as a result of Respondent's discrimination against them in the manner set forth in the section herein entitled "The Remedy."

(c) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Post in conspicuous places at Respondent's mine, including all places where notices to employees are customarily posted, for 60 days, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed on behalf of Respondent by its president and by the highest managerial official of the mine. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ALSO ORDERED that the election of December 29, 1981, be set aside and that the election petition in Case 9-RC-13948 is dismissed.

IT IS FURTHER ORDERED that those allegations of the consolidated complaint not found to be sustained are dismissed.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate employees concerning their union activities or those of other employees.

WE WILL NOT request that employees obtain and report information concerning the union activities of other employees.

WE WILL NOT create the impression that the union activities of our employees are under surveillance.

WE WILL NOT threaten employees with blacklisting, dismissal and other forms of reprisals for engaging in union activities.

WE WILL NOT threaten to close operations in retaliation for union activity.

WE WILL NOT order employees to remove prounion stickers and posters from their cars and trucks.

WE WILL NOT tell employees that, because of their prounion stance, we cannot guarantee their personal safety.

WE WILL NOT promise the grant of future benefits based on our employees' rejection of union representation.

WE WILL NOT tell prospective employees that they are not being hired because they are union supporters.

WE WILL NOT create the impression that union support is futile by telling our employees that we will never negotiate with a union.

WE WILL NOT announce that any implementation of, or change in, personnel policies is the result of an effort to discourage or limit our employees' union activities.

WE WILL NOT discharge, discipline or otherwise discriminate against employees with regard to their hire or tenure of employment or any term or condition thereof because of their union activities or in order to limit or discourage union activities.

WE WILL NOT refuse to bargain collectively with United Mine Workers of America as the exclusive bargaining representative in the following appropriate unit:

> All production and maintenance employees employed by [Respondent] at its Valeski, Ohio mine, preparation plant, loading facility, and repair shop, including reclamation employees, but excluding all

[12] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL, on request, recognize and bargain in good faith with United Mine Workers of America as the exclusive representative of all employees in the appropriate unit set forth above with respect to rates of pay, wages and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a written, signed agreement.

WE WILL offer Philip Martin, Lester Haybron, Richard Zimmerman, Paul Martin, Donald Waldren, Virgil Jackson, Eugene Coleman, Delmar Waybright, James Dailey, Leonard Burris, and Edward Mullins immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them and employees Jack Allberry, Richard Nickels, and any other employee discriminated against whole for any loss of earnings, benefits or allowances connected with their employment status they may have suffered as a result of our discrimination against them, including interest.

WE WILL expunge from our records and files any notiations dealing with the terminations of the employees found to have been discriminated against and WE WILL notify these employees in writing that this has been done and that evidence of such terminations will not be used as a basis for future personnel actions.

SWAN COAL COMPANY